No. 88-2128

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The critical issue in this case is whether the management rights provision of 5 U.S.C. 7106(a)(2) precludes negotiation of a union proposal to subject to grievance and to third-party arbitration claims that the agency's contracting-out determinations failed to comply with OMB Circular No. A-76. The resolution of that issue turns on the interpretation of the management rights provision, and in particular on whether Circular A-76 is an "applicable law[]" within the meaning of Section 7106(a)(2).

1. Respondents and amici American Federation of Labor et al. nevertheless focus their argument on the definition of a grievance in 5 U.S.C. 7103(a)(9). They contend that because the proposal deals with

matters that would be within that definition in the absence of the management rights provision, the proposal is therefore negotiable.[1] This argument, which reads the statute to give overriding effect to the grievance definition, is flatly inconsistent with the statement in the management rights provision (5 U.S.C. 7106(a)) that "nothing in this chapter [necessarily including the definition of grievance] shall affect the authority of any management official of any agency" to exercise the specified management rights in accordance with applicable laws. This language demonstrates that Congress intended the management rights provision to prevail over the grievance definition, not the other way around.[2]

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[1] As we explain in our opening brief (at 28-29), we do not agree that Circular A-76 is a "law, rule, or regulation affecting conditions of employment" within the definition of a grievance in Section 7103(a)(9). But the core of our argument is that this case turns on the management rights provision, not the grievance definition.

[2] Respondents rely (FLRA Br. 26-27; NTEU Br. 35-36 & n.22; see also AFL Amici Br. 11-12 & n.7) on an ambiguous statement by Representative Udall and on post-enactment remarks by Representative Ford. These snippets of legislative history do not justify ignoring the clear statutory language. See *National Treasury Employees Union* v. *Federal Labor Relations Authority*, 856 F.2d 293, 306 (D.C. Cir.), rehearing en banc granted, 856 F.2d 308 (1988) (Silberman J., dissenting, and noting with reference to identical Ford statement, that "even had it been made as part of the legislative history instead of in lieu of it," the statement would hardly be conclusive); accord *American Federation of Government Employees* v. *Federal Labor Relations Authority*, 712 F.2d 640, 647 & n.29 (D.C. Cir. 1983). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) ("post-passage remarks of legislators * * * cannot serve to change the legislative intent of Congress"). And, particularly when Rep. Udall's statement is read in full (see NTEU Br. 35), both statements are less sweeping than respondents suggest. Both statements say only that when applicable law is violated, statutory or any applicable contract review procedures may be used to complain of the violation. Neither statement suggests that the grievance procedure is *itself* an applicable law that overrides the management rights provision, nor could the provision rationally be construed to contain its own repeal.

Respondents turn this statutory scheme on its head, arguing that the dispositive question is whether the proposed subject of negotiation is within the statutory definition of a grievance, on the theory that if it is, it is necessarily subject to the statutory grievance and arbitration procedures. Indeed, respondent FLRA asserts (Br. 30 n.14), and amici AFL et al. agree (Br. 5 n.4), that this case can be decided without determining whether Circular A-76 is an "applicable law" within the meaning of the management rights provision.[3] Respondent FLRA

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[3] This assertion, which is inconsistent with the rationale of the FLRA's decision in this case (see Pet. App. 15a), overlooks the fact that agency action must "be upheld, if at all, on the same basis articulated in the order by the agency itself," *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169 (1962), citing *SEC* v. *Chenery*, 332 U.S. 194, 196 (1947). The assertion is also inconsistent with the clear assumption of the court of appeals' decision in *EEOC* v. *FLRA*, 744 F.2d 842, 850-851 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986), which it followed here (Pet. App. 5a); with this Court's dismissal of certiorari in *EEOC* for failure to raise several "central issues," including this one (476 U.S. at 24); and with Justice Stevens' dissent from that dismissal, noting that he would reverse the judgment of the court of appeals precisely because Circular A-76 is not an "applicable law[]" (476 U.S. at 27). While the assertion that the "applicable laws" provision is irrelevant is quite wrong, it is perhaps understandable in light of the fact that, as we observed in our opening brief (at 24 n.24), *every* judge who has discussed the issue has agreed with our contention that Circular A-76 is not an "applicable law[]."

does nevertheless concede that arbitration must be conducted with sensitivity to management rights, and argues that *Blytheville*, 22 F.L.R.A. 656 (1986), and related decisions reflect just such sensitivity.[4] The statute, however, does not leave the protection of these reserved management rights to the discretion of independent arbitrators exercising authority under the grievance procedures, or to the FLRA in reviewing their decisions. Instead, if a matter is exempted from all of Title VII by the management rights clause, then that exemption includes the grievance and arbitration procedures defined in Title VII.

If the FLRA's contention that the grievance definition prevails over the management rights provision were correct, it would follow that all parts of that definition, which includes "*any* complaint * * * concerning *any* matter relating to * * * employment" (5 U.S.C. 7103(a)(9)(A) and (B) (emphasis added)), would be subject to grievance and arbitration, and the management rights clause would exempt nothing related to employment from arbitration. Indeed, respondent NTEU makes precisely that claim (Br. 19-20). This interpretation of Title VII overlooks the fact that the statute was designed to establish a balanced federal labor relations system, recognizing both collective bargaining rights and the "special requirements and needs of the Government," including the "requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). See *Army-Air Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1145 (D.C. Cir. 1981) and legislative history there cited (Title VII's "variety of purposes" include not only protecting employee bargaining rights, but also "strengthen[ing] the authority of federal management to hire and discipline employees").

In addition, the FLRA interpretation of the statute would mean that the union proposal at issue here is not only superfluous, but also far narrower than the union and employee grievance right provided directly by the statute.[5] Under the FLRA's view, *all*

[4] Respondent FLRA asserts (Br. 30-31) that "the determination as to the impact or application of [the management rights provision] is to be made in connection with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy," and offers its assurance that "the full range of management's discretion in making contracting-out determinations will be preserved in the arbitral review process," citing *Blytheville*'s limitation on the arbitrator's authority. It is hard to see the statutory basis for the *Blytheville* decision. Respondent FLRA does not explain how the management rights provision can reasonably be read to prevent an arbitrator from setting aside a contracting-out decision, but not from ordering the agency to restructure it. Both forms of relief are intrusive, and the management rights provision simply does not distinguish between more and less intrusive infringements of reserved management rights. Although respondent FLRA does have authority, subject to judicial review under 5 U.S.C. 7123, to determine issues of negotiability, it does not have authority to enforce the management rights provision selectively. Moreover, in attempting to postpone issues of the scope and applicability of the management rights provision to the arbitration stage, the FLRA is seeking to circumvent the judicial review provisions of 5 U.S.C. 7123.

[5] Respondent NTEU (Br. 6-7, 19 n.6) and amici AFL et al. (Br. 4-5 n.3) offer "practical" reasons for including in collective bargaining agreements requirements that the parties comply with specific applicable laws and regulations. But including such matters in the collective bargaining agreement does not serve to make it a "self-contained reference for each of the parties concerning their rights and obligations" (NTEU Br. 7); the parties are constrained by applicable laws whether

of Circular A-76 is subject to the grievance procedure (subject only to the decision of the arbitrator, and the FLRA on review, as to what is discretionary), whereas the union negotiating proposal is limited to those matters subject to the internal appeals procedure of the Circular (primarily, questions arising under Part IV of the Supplement, see Gov't Br. 9-10).[6]

2. The question then is whether, despite the specific reservation in the management rights provision of the right to make "determinations with respect to contracting out," the Union's proposal is still subject to bargaining because Circular A-76 is an "applicable law[]," and the proposal seeks only to ensure compliance with it.[7]

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or not those laws are included in the collective bargaining agreement. Accordingly, inclusion of some, but not other, applicable laws in the agreement makes it not "self-contained," but actually misleading. This is particularly true when the negotiated provision is narrower than the applicable obligation.

[6] Perhaps because it realizes that its arguments go well beyond the scope of the Circular's internal appeals procedure, respondent FLRA, unlike respondent NTEU, makes no effort to stress the allegedly non-discretionary aspects of Part IV of the Supplement.

[7] To be sure, the management rights provision, in subsections b(2) and b(3) (5 U.S.C. 7106(b)(2) and 5 U.S.C. 7106(b)(3)), specifically subjects certain matters relating to management rights, including contracting out, to the provisions of Title VII. Whether or not Circular A-76 is an "applicable law[]," "procedures * * * the agency will observe in exercising" contracting-out authority, and "appropriate arrangements for employees adversely affected by the exercise" of such authority are negotiable.

The Union's proposal here goes far beyond any question under Section 7106(b)(3) of the impact on employees affected

a. We do not contend that the phrase "applicable laws" draws a distinction between statutes and regulations having the force of law. We do contend that it distinguishes between such commands and statements of internal policy such as Circular A-76. There are several bases for this contention. First, as explained in our opening brief (at 25), the D.C. Circuit has itself recognized that in order to qualify as an "applicable law[]" limiting the management rights provision, it must be shown that the alleged limitation on management power was "intended to qualify management authority in favor of union participation; and that the participation proposed for the union will not expand any statutory restriction on management." *National Federation of Federal Employees, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.30 (1987). As we further explain in our opening brief (at 24-28), the clear terms of Circular A-76 itself demonstrate that there was no intent to establish any private rights to restrict agency authority to make

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by a decision to contract out. And as we have explained in our opening brief (at 36 n.35), the proposal is not limited to matters of "procedure" within the meaning of Section 7106(b)(2). As the Fourth Circuit stated in holding an analogous proposal non-negotiable, "[t]hird party review would inevitably result in arbitrators supplanting agency managers as the final arbiters of the Circular's discretionary requirements, and of government-wide contracting out policy. Such a result cannot be considered anything but 'substantive.'" *U.S. Department of Health and Human Services* v. *FLRA*, 844 F.2d 1087, 1097 (1988). See generally *AFGE* v. *FLRA*, 702 F.2d 1183, 1186-1187 (D.C. Cir. 1983). Thus if, as we contend, Circular A-76 is not an "applicable law[]," no independent basis of negotiability may be found in Section 7106(b)(2). Indeed, the FLRA did not rely on that provision in its decision in this case, and neither the Authority nor the Union relies on it here.

contracting-out determinations. Thus, the Circular specifically precludes the interpretation of its provisions to "create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with th[e] Circular" (Gov't Br. App. 5a, para. 7c(8)), and prohibits any "appeal outside the agency," or judicial review, negotiation, arbitration, or agreement concerning the procedure and decision on agency appeal (Gov't Br. App. 12a-13a, paras. 2, 7).[8]

We therefore submit that such an internal policy statement cannot be an "applicable law[]" within the meaning of the management rights provision.[9] In

[8] Respondents contend that our argument would also prohibit subjecting agency compliance with the Federal Personnel Manual to grievance and arbitration (NTEU Br. 25-26; FLRA Br. 41). Respondents allege, relying solely on FLRA decisions, that such a result would be inconsistent with established practice. Whatever the accuracy of that assertion, the applicability of Title VII to the Federal Personnel Manual is not at issue in this case, and was not addressed by the courts below. We therefore hesitate to make any generalizations on this subject, particularly in light of the fact that the Federal Personnel Manual provides guidance and direction on a vast range of subjects. We do note, however, that—in sharp contrast to Circular A-76 at issue here—the Manual does not contain any general disavowal of an intent to create legally enforceable rights and obligations. *Cf. Doe* v. *Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977) (whether certain provisions of the Federal Personnel Manual are binding turns on whether they were "so intended" by the agency that promulgated them).

[9] Respondents rely on the legislative history of a different provision—Section 7117(a)—to establish that policy directives are within the definition of "Government-wide rule or regulation" used in that Section, and thus within the term

any event, the special character of Circular A-76, which is a presidential directive concerning the procurement policies of executive branch agencies, makes it peculiarly inappropriate to subject agency compliance with its provisions to review by independent arbitrators.[10] See Gov't Br. 38-42.

Contrary to the suggestion of respondent NTEU (Br. 28-32), the status of the Circular under the "applicable laws" provision does not vary with the measure of discretion inherent in any particular provision of the Circular. Nothing in Title VII suggests that the FLRA may dissect internal policy statements on matters within the scope of management rights in order to separate out their "non-discretionary" aspects and then subject those aspects to the

"law, rule or regulation" in the grievance definition in Section 7103(a)(9)(C)(ii). NTEU Br. 22-23; FLRA Br. 35. They do not explain why, even if they are correct, that definition also applies to the "applicable laws" language of Section 7106 (the management rights provision), and quite clearly it does not. Section 7117(a) represents a legislative recognition that bargaining under the Act should not lead to inconsistent applications of government-wide directives, whether or not those directives have the force and effect of a law, rule, or regulation. It does not follow that Congress also intended to include such policy directives within the definition of grievance, thus giving federal employees and their union substantive rights specifically precluded by the applicable policy directive. Still less should the Congress be deemed to have included such policy directives within the narrower "applicable laws" limitation of the management rights provision.

[10] Contrary to the suggestion of respondents (NTEU Br. 22; FLRA Br. 36), the fact that revisions of the Circular have been published for notice and comment in the Federal Register does not establish that the Circular has the force and effect of law. *Cf. Federal/Postal/Retiree Coalition, AFGE* v. *Devine*, 751 F.2d 1424, 1426 n.2 (D.C. Cir. 1985).

grievance procedures and ultimately to binding arbitration. Instead, for the reasons noted above and in our opening brief (at 24-28 and 38-42), the Circular as a whole is not an "applicable law[]," and accordingly agency compliance with it is exempted from Title VII by the management rights provision.

b. Nothing in the Comptroller General's practice of reviewing the objections of disappointed bidders to contracting-out decisions is inconsistent with our interpretation of the relation between Circular A-76 and Title VII.[11] Indeed, the Comptroller General has emphasized that Circular A-76 is simply a policy guideline that does not create legally enforceable rights (*Federal Employees Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244, 244-245 (1985) (citations omitted)):

> Our Office has repeatedly declined to render decisions concerning the propriety of an agency's determination under Circular A-76 to contract for services instead of performing the work in-house. These determinations are beyond the scope of our bid protest decision function because the provisions of the Circular are matters of executive branch policy which do not create legal rights or responsibilities.
>
> We do, however, consider it detrimental to the competitive system for the government to decide to award or not to award a contract based on a cost comparison analysis that did not conform to the terms of the solicitation under which the bids were submitted. For that reason we do entertain protests which allege faulty or misleading cost comparisons of in-house estimates with bids received. Even in those cases, however, our review is intended only to protect the parties that competed from the arbitrary rejection of their bids; our review does not extend to protests by non-bidders such as federal employees or

[11] Under the Competition in Contracting Act of 1984, 31 U.S.C. 3551 *et seq.*, the Comptroller General entertains claims by disappointed bidders that the agency failed to comply with the terms of the relevant solicitation for bids. As part of that review process, the Comptroller General will consider an agency's compliance with the provisions of Circular A-76 when those provisions are incorporated into the terms of the challenged bid solicitation. See *Pan Am World Services, Inc.*, B-215829 (Comp. Gen. June 24, 1985). If, on the basis of that review, the Comptroller General determines that the agency has not complied with the bid solicitation, he may recommend corrective action to the agency concerned (31 U.S.C. 3554(b) (Supp. V 1987)), and award the disappointed bidder reimbursement for the costs of the bid preparation and protest (31 U.S.C. 3554(c) (Supp. V 1987)). If the head of the procuring agency decides not to implement the Comptroller General's recommendation, he must report that decision to the Comptroller General, who in turn reports the decision to Congress (31 U.S.C. 3554(e) (Supp. V 1987)).

The Comptroller General, as the agent of Congress in evaluating federal procurement operations, may recommend corrective action to the procuring agency, and in doing so may consider whether a disappointed bidder was subjected to an unfair cost comparison. In the course of that consideration, he has decided that he may look to the provisions of Circular A-76, because those provisions are incorporated into the bid solicitation. See note 11, *supra*. That limited consideration is, of course, unconstrained by any provision equivalent to the management rights provision of Title VII. The authority of the Comptroller General—an official with particular expertise, experience, and responsibility for evaluating government procurement practices—to make recommenda-

tions to procuring agencies does not undercut our contention that Title VII prohibits subjecting agency contracting-out decisions under Circular A-76 to binding and largely unreviewable independent arbitration.

3. Respondents' briefs devote significant attention to refuting arguments that we do not make. Contrary to the assertion of respondent FLRA (Br. 24), we do *not* assert that the mere inclusion of determinations regarding contracting out within the management rights provision precludes negotiation over whether such determinations are made "within legal and regulatory requirements" (*ibid.*). As emphasized in our opening brief (Br. 37), our position rests on the recognition of Circular A-76 not only as a document dealing with a matter of management rights but also as an internal policy guideline that confers no legally enforceable rights and that is therefore not an "applicable law[]."

As also explained in our opening brief (at 37), we do not contend that contracting-out determinations are wholly exempt from the grievance and arbitration mechanism, or that such determinations are grievances but are implicitly included within the exceptions to that mechanism identified in 5 U.S.C. 7121(c). Cf. NTEU Br. 19 & n.7; AFL Amici Br. 10-11. Our point is instead that, by virtue of the management rights provision and the nature of Circular A-76 as a management tool, the Circular is neither an "applicable law[]" within the management rights provision nor a "law, rule, or regulation" within the definition of a grievance (see note 1, *supra*).[12]

[12] We note that in other contexts, the courts of appeals have declined to resolve questions of the coverage of Title VII simply by reference to the definition of "grievance" and the specified exclusions from that definition in Section 7121(c). See, *e.g.*, *Department of Justice* v. *FLRA*, 709 F.2d 724, 727-730 & n.22 (D.C. Cir. 1983) (adverse personnel actions against probationary employees may not be subjected to the grievance and arbitration provisions of Title VII).

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General *

DECEMBER 1989

* The Solicitor General is disqualified in this case.